3 U. S. Code, Cong. & Ad. News, page 4596 (84th Cong., 2d Sess. 1956) 20

Wilson, Rufus E., Restraint of Trade Implications in Franchise Agreements, talk before Briefing Conference on Antitrust Laws & Trade Regulations sponsored by the Federal Bar Association and Foundation of the Federal Bar Association in cooperation with the Bureau of National Affairs, Inc., January 4, 1962 21

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 1151.

FABERT MOTORS, INC.,
Plaintiff-Petitioner,

v.

FORD MOTOR COMPANY, a Corporation,
Defendant-Respondent.

REPLY BRIEF OF PETITIONER.

The brief of the respondent intermixes the several matters upon which it relies. For the convenience of this Court, we will try to group our replies to those matters under appropriate headings.

1. The impact of the Dealer's Day in Court Act is a primary question.

Before we correct the errors in factual statements made by defendant, let us point out that the questions in the case contained on Page 1 of the defendant's brief make no reference to the Dealer's Day in Court Act. Let us also take blunt issue with defendant's assertion upon Page 7 that this case does not merit review by certiorari.

This is a case of first impression; it will determine whether the Dealer's Day in Court Act is viable or ossified. If the decision of the lower court stands, the manufacturers have then evolved a method to circumvent the statute which is completely successful.

We sincerely believe, and urged in our Petition, that validity cannot be upheld of a release compelled by a manufacturer under circumstances bringing the Dealer's Day in Court Act into operation (10, 12):

> "If the mere fact that a release was executed deprives a dealer of a right to jury trial, then there never would be a judicial remedy in any instance of forced resignation, since the manufacturer always would require some such instrument to be signed before repurchasing the dealer's cars and parts under the franchise agreement. • • •
>
> "A terminated dealer obviously will not receive one dime from the manufacturer without executing an instrument meeting the approval of such manufacturer. The more desperate the plight of the dealer, the more subject to pressure, the more susceptible to duress, he is—and the more likely he is to sign the instrument which the manufacturer demands. If, accordingly, the execution of a release *ipso facto* destroys the dealer's remedy, then the duress and compulsion inhibited by the statute could not even be considered by a jury—and this is precisely what the lower courts held in determining this issue upon a motion for summary judgment."

At no place in its brief does Ford Motor Company even comment upon this point. By failing to join issue upon it, defendant tacitly concedes its accuracy. It prefers to speak of releases executed in situations of equal bargaining power. Not once is the Dealer's Day in Court Act mentioned. We will refer to this again shortly, in eval-

uating the matter of duress. But we say that the policy of that law prevents its circumvention by securing the execution of an instrument denoted as a letter of resignation, a release, or any other description. In some respects, it is similar to the F. E. L. A. where Congress has determined that certain persons shall be protected by law; a summary judgment upon a release issue in such a situation is almost inconceivable. This is a tremendously important problem, having a nationwide impact. If the Dealer's Day in Court Act is to fall, let it be by repeal of the Congress—not by a subterfuge countenanced by this Court.

This statute was not enacted as a result of the sudden whim of a legislator. It has a long legislative history, its purposes being pointed out in the Appendix to the Petition. There were powerful economic reasons compelling its enactment, as traced by Burns, *A Study of the Antitrust Laws*, pp. 436-465. If that purpose can be thwarted by compelling a dealer to submit a letter of resignation, or to sign a release, irrespective of the coercion preceding those steps or concurrent therewith, the dealer has gained no protection at all. Whether there was, in fact, fair dealing is a question which demands a full hearing.

Let us correct the errors in some of defendant's factual assertions; then we will return to this problem as it exists in this case.

2. Correction of errors of statement by defendant.

To be certain that this Court is not misled as to the facts here presented, it is well, in the inception, to correct several inadvertent misstatements appearing in the brief of Ford Motor Company. At no place, by the way, does the defendant assert that our Statement of Facts is inaccurate; at one place, it terms such statement "inade-

quate". Unfortunately this is precisely the reason why a trial on the merits is necessary, in order that the testimony of all parties and witnesses be received, rather than attempting to dispose of controverted issues (or attempting to evaluate the impact of threats or statements upon a person whom the trial court has never seen) by summary judgment. We have not even had an opportunity to present our evidence—even of the members of the Fabert family. And it is odd that, if Ford Motor Company had great confidence in the release issue, it would have waited more than three years to file its motion for summary judgment based thereon (App. 1, 2—Complaint filed August 15, 1961; motion on October 7, 1964).

The corrections of defendant's misstatement refer to the pages of defendant's brief:

Page 3—"and revised by him". At no time was the form of the release which defendant had prepared changed by the plaintiff. It was enlarged to exclude items then in the course of adjustment (App. 68). In fact, defendant on Page 5 of its brief pointed out that blanks were left in the form letter for the amounts to be paid for "the purchase of signs, and special tools, and for rent".

Page 3—"Petitioner made no objection to signing the release on October 2, 1959, or at any other time." Fabert protested the entire cancellation procedure to Coward, Ford's representative, who forced the resignation (App. 41, 64, 66, 74-76, 101-103); he expressed his dissatisfaction to Gruendler, who brought down the release (App. 68); and Mrs. Fabert called Norman Mitchell, who had been in charge of the area, and the Faberts also visited him personally; but Mitchell stated they would have to do as Coward directed (App. 110, 111).

Page 3—"Elwood Fabert sent a letter to Ford dated July 2, 1959, requesting termination." This is the same letter written up by Coward for Fabert to send in, a

photostatic copy of which appears in Coward's handwriting (App. 131).

Page 3—"Fabert sent in another request dated August 10, 1959, in which the amount was changed to $24,000" (one year's rent). Defendant omits all of the following which preceded that letter (App. 66, 67):

"Fabert: Tom, Detroit has rejected this letter you had me write. Now what happens?

"Coward: Well, you'll have to resubmit it for twelve months' rent. That's all they'll approve.

"Fabert: Tom, we started out with two years' rent, you told me to drop it to eighteen months which I did, that was rejected. Now you tell me they'll only approve twelve months' rent so I'm not any better off than if I was cancelled.

"Coward: That's not true. You're still getting a better deal on your signs, your tools, and you don't have a black eye from being cancelled.

"Fabert: This changes the picture quite a bit. I would still rather just stay here and sell Lincolns and Mercurys like I always have.

"Coward: You can't do that because we have already decided on a resignation for you or you're going to be terminated, so you might as well send in a request for twelve months' rent which I assure you will be approved. If we cancel you, we're going strictly by appraisal prices and you'll have a helluva time getting another franchise of any kind. You've got a pretty big plant there to be sitting idle.

"Fabert: So I still don't have any choice—only two, resign or be terminated.

"Coward: That's about the size of it. If you're smart, you'll send in the letter of resignation in.

"Fabert: What in the world am I going to do now?

"Coward: You'll find something to do. You are coming out of it without a black eye by resigning."

Page 5—In referring to the Coward conversations, defendant wholly omits Coward's statement that Ford could and would cancel plaintiff, without cause, if Fabert refused to take on the Edsel (App. 64-67); that such cancellation would give plaintiff a "black eye" and that plaintiff could never get another franchise (App. 64, 74); and that in order to take on such franchise, plaintiff would have to put in $40,000 to $50,000 into Edsel cars and parts (App. 63, 75).

Page 5—"Fabert sent in such a letter after consultation with the attorney * * * and after holding special meetings of the shareholders and directors." Fabert, by his affidavit and in his discovery deposition (taken by the defendant, obviously) stated that he believed Coward's threats and did not consult an attorney (App. 42); also that the so-called shareholders were himself, his wife, and son—that they held no formal meeting upon this but believed they had no choice except to do what Coward had demanded; and, following their family discussion, prepared the necessary papers and sent them in (App. 89, 90, 104, 105).

3. The application of the Dealer's Day in Court Act to these circumstances is not contested.

It is interesting to observe that at no place does the defendant, Ford Motor Company, assert that its conduct was not in violation of the Dealer's Day in Court Act. In its fifteen pages of objections to this Court reviewing the actions of the lower tribunals, in not one place is that statute mentioned, nor its legislative history or purpose, or its applicability to the circumstances here presented. Instead, defendant states, in effect: "we got a release from the plaintiff" and impliedly "so what if we got it the hard way, in violation of this statute. The plaintiff is bound by the release."

We believe that both the letter and spirit of this statute clearly prevent such forced resignations, where there is such a disparity in bargaining power. How can a court possibly pass upon an issue of this type until it has heard all of the evidence to determine the various economic pressures which have brought about the "breaking-point"; how can it determine the impact of threats and economic compulsion upon individuals without personally seeing those individuals, observing their demeanors, and weighing the impact of words and conduct upon them, perhaps even knowing their states of health? Each of the decisions relied upon by the defendant deals with a situation where the parties were of relatively equal strength, where they were dealing "at arms' length". It was the very disparity in bargaining power which brought about the enactment of this statute. Even though the present record is based wholly upon depositions taken for discovery purposes, and does not include the proof which the plaintiff would produce at the time of trial, nevertheless it disclosed that plaintiff was in a position to be particularly vulnerable to the exercise of such economic compulsion.

Keith Kemper and Elwood Fabert, and their wives, had the greatest seniority of any Lincoln-Mercury dealers in the United States (App. 37), with their franchise dating from 1940 and being actively operated except during World War II when both partners were in the armed services. They resumed active operation in 1946 and continued until the end of 1955 when a dissolution was discussed, with the question being resolved by Ford Motor Company as to which of the partners should carry on the franchise. It selected Elwood Fabert over his partner (App. 38), and a family corporation was created by the Faberts—this being the plaintiff here.

Certain economic factors then combined together to set the stage for the economic duress which was applied

effectively in 1959. Some of these factors were as follows:

1. In addition to turning over to Kemper all of Fabert's interest in several joint investments, the Faberts paid Kemper approximately $63,000 in cash (App. 38);

2. In 1956, the defendant required plaintiff to set up a branch operation in Rantoul, a step which Mr. Fabert protested and which was expensive, produced duplicate overhead, and increased repossessions without increasing gross sales (and which Ford eventually permitted plaintiff to discontinue late in 1958, App. 39). Indeed one of the defendant's own agents admitted that Rantoul could be quite adequately serviced from Champaign without the wasted overhead (App. 119):

> Q. Did you feel that that potential volume of new car business generated from that army base and from Rantoul could be serviced by the Champaign dealership?
>
> A. I think so, yes. * * *
>
> Q. Mr. Nowak, let me ask you this question: Did you feel in the year 1958 at the time you examined the Champaign premises that the Rantoul operation was losing money for the business?
>
> A. In my analysis, it appeared it was expensive to operate this lot as a separate facility, yes.

3. The man Ford insisted Fabert take as manager for the Rantoul operation not only sold cars for too low a down payment, causing numerously costly repossessions, but also embezzled thousands of dollars from the operation, only a fraction of which was ever reimbursed by the bonding company (App. 86, 87, 88). Of course, Ford did not suffer any loss since it did not reimburse Fabert for any of these losses caused by its protege.

4. The automobile market slipped from the period of 1956 to 1958 causing a serious drop in all dealer incomes (App. 148).

> Q.. Mr. Ford, was there any change in the general economic situation of the automobile business from the year 1955 to the year 1958? * * *
>
> A. '55 was the biggest automobile year that the industry had had since the end of World War II and actually the biggest year up until last year. '58 was quite a depression year, or recession year I guess would be better to say, for the industry, and our sales and production were way down as compared to what they were in 1955.

5. In 1957, the defendant introduced the Edsel which captured 40% of its sales from other Ford products; and, while overhead remained relatively constant, profits of the Lincoln-Mercury dealers slowly invaded by a competitor of the same manufacturer, went down (App. 151, 152).

> Q. Now, going back for a moment, Mr. Ford, to the memorandum of April 15, 1958 by Mr. McNamara, page four, right in the middle of that page in parentheses at the end of paragraph one which is numbered do you find the statement that, "The 1958 Edsel was probably drawing about 40% of its sales from other Company lines?"
>
> A. Yes.

It was also stated by others (Holden, App. 135):

> Q. What was the price class of the Edsel automobile?
>
> A. It spanned the so-called medium price class. It went from the so-called low price class to the high priced class. * * *
>
> Q. And did various models of the Edsel automobile

compare pricewise with the various products of the Mercury line?

A. Yes.

McCrea (App. 141):

Q. Was the Edsel in the same general price class as the more popular priced Mercurys?

A. I think it covered the entire range of Mercury price class, as my memory serves me.

Q. About the same general size, weight and cost?

A. Well, give or take, I would say generally this covers it, yes.

Vass (App. 143):

A. * * * It is my recollection that the original assumptions were that 50 per cent, approximately of Edsel volume would be incremental.

Q. In other words, the Mercury line sales would increase by about 50 per cent by the number of Edsels which had been sold, right?

A. As I recall, yes. * * *

6. In 1957-1958 the larger Mercury-Lincoln engines were defectively manufactured, causing drops in sales, loss of good will, and expensive repairs, for the years 1957, 1958, and 1959 (App. 151):

Q. Is it not a fact then that the 1958 model product quality has been a minor deterrent to M-E-L sales in 1958 and continued to hamper sales in 1959? * * *

A. It so states there in the memorandum. * * *

Q. Now, Mr. Ford, did these engines which had developed these difficulties hurt sales of Lincoln and Mercury automobiles in the model year 1958 which commenced in October of 1957?

A. It so states there in the memorandum. * * *

Q. And, of conrse, it also hurt sales in 1958, that is the calendar year 1958, did it not, sir?

A. Yes, that would be the answer.

These matters, along with others which will be shown in evidence, required the Faberts to pump their personal resources into the franchise in order to maintain it on a sound basis. And the franchise was on a sound basis. At the time of filing the required affidavit under the Bulk Sales Act in connection with the termination of the franchise, other than for advancements by themselves and amounts owing for automobiles and parts (which is admittedly customary in the trade), the plaintiff corporation owed less than $11,000 to all third party creditors, even though transacting a business in excess of a half a million dollars a year (App. 44). And as is shown by various exhibits, the operation of the plaintiff received repeated commendations from the defendants; and, at all times, the plaintiff was most cooperative in following any practices recommended or desired by the defendant (App. 120, 121):

> "I agree with Dick Yates, who handled this before, that this is an excellent dealer." (Dealer Contact Report of November 18, 1958.)
>
> "This dealership has an excellent parts operation." (Dealer Contact Report F657 of December 17, 1958.)
>
> "* * * Dealership was very cooperative in assisting this writer in setting up product and comparison meeting." (Dealer Contact Report F638 of 2/14/57.)
>
> "We believe that Fabert Motors, Inc., will provide very good representation in their area. * * * We will appreciate approval of this sales agreement as soon as possible." (Letter from T. A. Coward of March 20, 1958.)

Coward (App. 124):

> Q. You would say he was a cooperative dealer in that regard.
>
> A. Yes, sir. I would say he was a cooperative dealer in all respects. * * *

McBain (App. 116):

Q. Did you consider Mr. Fabert to be skilled in the automobile sales field?

A. Yes.

Q. And was he cooperative and conscientious, so far as you were concerned?

A. Yes.

Q. With reference to the service department, were you acquainted with the service manager Julian Smith?

A. Yes.

Q. Did you consider him to be well qualified?

A. Yes.

It is obvious, accordingly, that the plaintiff was an excellent dealer who would not have been cancelled or forced to resign except for its refusal to accept the Edsel franchise. This is the type of a dealer whom any manufacturer would want to retain—except for the fact that it refused to accede to the illegal demands presented by the "tie-in" arrangement. Furthermore, as pointed out in the Petition, Ford obviously had no intention of terminating Fabert in the inception—but had intended to terminate Eichhorst and had even approached Eichhorst in 1958 for the purpose of terminating him, and not with the acquiescence or cooperation of Fabert (App. 132, 133). And, at all times, the Fabert franchise was in much better financial condition than was that of Eichhorst (App. 133, 134).

4. Ford's conduct cannot be justified as a business decision.

The defendant, Ford Motor Company, upon page 6 of its brief, seems to argue that the various actions which it took were due to proper business decisions the necessity of which became apparent almost immediately after

the Edsel was introduced. Interestingly enough, in this very suit, the defendant denied that any dualing program existed at any point of time. The Amended Complaint alleged in paragraph 6, Count I, which is substantially paragraph 7, of Count II, as follows:

> "6. That in the year 1959 the defendants, in violation of the franchises of the plaintiff, demanded that the plaintiff add to its lines of automobiles sold and serviced a certain automobile in a price class competitive to the Mercury line already carried by the plaintiff, such other automobile being known as the Edsel, and demanded that the plaintiff invest many thousands of dollars in such Edsel automobiles, special equipment, and parts for the servicing of such automobiles; that at such time the defendant already had a franchised dealer in Edsel automobiles in the City of Champaign, County of Champaign, and State of Illinois; and that similar demands were made of many of defendant's other dealers throughout the United States."

The respondent admitted by its answer (App. 19) that it had a franchised dealer in Edsel automobiles in the City of Champaign, Illinois and then stated: "* * * it denies each and every other allegation in the said paragraph 6."

The petitioner then went on to allege (App. 6-12) that the respondent engaged in a course of conduct designed to force such dealers to resign their franchises if they did not acquire the Edsel franchise; this, again, the respondent denied by its Answer (App. 19, 22). It was not until the petitioner had taken the depositions of every active executive official of the Ford Motor Company and had required the production of documents by the respondent which conclusively proved this "tie-in" policy that the respondent now cavalierly admits that such dualing

program was in effect in 1958 and 1959. No longer can it deny these matters.

Now that the respondent feels it must admit the fact that such dualing operation was going on, it attempts to justify it on the basis that such was a business decision, and that it had a right to act as it did. There is no question but that it was sound business to discontinue the manufacture of the Edsel; however, this did not condone attempting to shift the loss to the dealers in other makes of automobiles. Ford had no right to deliver an ultimatum to the plaintiff that it add a franchise which had no value. A review of the history of the Edsel helps to clarify this situation.

Within three months of the time it was introduced in 1957, one of the recommendations made in a study by Ford's Robert McNamara, was to cancel the Edsel immediately—but this was not followed because of the large losses it would cause in unsold cars and parts (App. 26, 27, 156). The next year, 1958, the defendant decided to consolidate Edsel and Lincoln-Mercury dealerships by forcing Lincoln-Mercury dealers to take on the Edsel franchise; or, if they would refuse to do so, to take their franchises away and give those franchises to the competing Edsel dealer, thus keeping alive a market for getting rid of the Edsel automobiles and parts (App. 136, 137). It is admitted in the Henry Ford deposition that this would require a substantial investment upon the part of any Lincoln-Mercury dealer for Edsel automobiles, parts, equipment, and special tools (App. 159, 160). The delicate term used, in this dualing situation, was to "encourage the dealers to resign" (App. 28, 29, 137). Throughout 1958, the intracompany memoranda of the defendant state the Edsel never made money and never will, and that there is no prospect of it ever producing a profit either for the company or for the dealers, and this fact was also admitted by the defendants in their depositions.

(Miller deposition, App. 141)

A. Yes, I am sure that the Edsel operation cost the company money every year we were in it.

Q. And that's why you got out of it. Is that right?

A. That is why we got out of it, yes, * * *

(Learned deposition, App. 140)

Q. So, so far as you are personally concerned, your concurrence in this decision was based upon the fact that the Edsel was a money loser?

A. And had no great prospects to be anything but a money loser.

(Henry Ford deposition, App. 161)

Q. Now, does this same memorandum of April 15, 1958 at page two state as to the Edsel franchises:

"This condition cannot be changed without the investment of substantial new capital by the dealers and the Company. The prospects for earning a return on such new investments, either for the separate Edsel dealers as a group or for the Company, are nil."

Does it so state?

A. Yes, it so states.

Despite these grave concerns over the future of the Edsel, on February 19, 1959, Henry Ford II, the company president, wrote all dealers of Ford products, as admitted in his deposition (App. 158):

Q. Mr. Ford, did you not just nine months to the day before the Edsel was abandoned write a letter to all M-E-L dealers as follows:

"You know that the Company regards the Edsel as a permanent member of the Ford Family of Fine Cars and that we are confident that the Edsel can and will prove to be a successful and profitable entry in present and future automotive markets."

Does your communication so state?

A. The communication so states.

Q. Does it also state this:

"We believe that the future for the Edsel is an excellent one, and we are backing up that belief with all the resources and talent required." * * *

The Witness: That's what this states, yes.

Q. Now, at the time you wrote that letter, Mr. Ford, had the Edsel ever made a profit in any year for the Ford Motor Company?

A. Not to the best of my recollection. * * *

The encouraging statements in Ford's letter to his dealers about a fine future for the Edsel were, frankly, untrue. Yet in this atmosphere the district manager, T. A. Coward, came to Champaign to call upon Elwood Fabert. Coward did not tell Mr. Fabert that six months earlier they had tried to terminate the Edsel dealer in Champaign, Eichhorst Motors, but that Eichhorst had refused to quit. Coward stated, as related by Fabert, that Fabert had to take on the Edsel and invest another forty to fifty thousand dollars in Edsel cars, parts, and equipment. Fabert stated that he wanted no part of the Edsel (App. 73, 75, 100). He was told that he had no choice—if he would not accept the Edsel, he could either resign or be cancelled (App. 74). If he were cancelled, he was told that he would have "a black eye" and have a tough time getting another dealership of any type (App. 74). Also he would be stuck with his used signs and equipment. And, while Ford was required by contract to repurchase these, yet Ford would bring in an appraiser to determine their "true" worth and Coward suggested that they would be found to be "practically worthless" (App. 74, 75, 102). There were two such conversations to the same general effect. Fabert believed that Coward was telling the truth, and that the defendant had the power to do that which he stated it would do. Owning a single purpose building suitable for nothing more than automobile sales and repairs, with great personal financial pressure resulting

from the matters previously described and fearful of the consequences of a company-induced cancellation, Fabert believed there was no alternative. He could not put another forty to fifty thousand into the business except by loans on property of value, and the Edsel, in his judgment, had no value. When Coward, in the course of the second meeting, issued his ultimatum Fabert surrendered. Whether a person of greater fortitude or stamina, or in better health, would have surrendered under those circumstances is to be determined after hearing and observing the witnesses. It is precisely for these reasons that this Court stated in Poller v. Columbia Broadcasting System, Inc., 368 U. S. 464 at 473 that trial "by affidavit is no substitute for trial by jury" and that it was stated in 6 Moore, *Federal Practice,* § 56.11 (3):

> "Since live trials are desirable, with the witnesses present in court and subject to cross-examination and their demeanor observable by the trier of the facts, the summary judgment procedure does not contemplate a trial by affidavits."

While the defense states in a footnote that: "the district judge below had an exhaustive record before him", he did not have a record which the plaintiff would introduce upon a trial upon the merits—nor can a poor man ever litigate against a corporation if he is placed in a position where he must try his lawsuit by deposition, instead of by witnesses. He is then simply priced out of court.

The defendant also refers to the amounts paid by it to the plaintiff—also to the fact that no such amount was repaid prior to suit. As pointed out in the Petition, the defendant received parts, equipment, and cars for the moneys which it paid, except for rental; only the trier-of-fact can determine what, if any, consideration existed separate and apart for tangible things as a foundation for the release; Illinois law does not require a tender, in all

events, of the consideration paid for a release, Ruggles v. Selby, 25 Ill. App. 2d 1 at 21, 165 N. E. 2d 733; and the minute that Ford Motor Company had replaced Fabert with Eichhorst as its dealer, nothing which Fabert could do ever could restore the former status. This suit is the only remedy left. And we do not believe a subterfuge of this type can destroy the vitality of the Dealer's Day in Court Act.

So far as the assertions of ratification and promptness in acting are concerned, again we believe these are factual questions to be determined from hearing the words of witnesses and observing their demeanor. Once an action has been taken which possesses completely finality, no action short of litigation could benefit the plaintiff. And, as pointed out by the authorities cited in the Petition—at no point of time, when these various instruments were being required of the plaintiff, was the economic coercion or duress removed. At least, such is a question to be determined upon a full hearing.

5. Ford's conduct amounted to a "tying" violation.

Along with never making mention of the Dealer's Day in Court Act, the defendant refers to the Sherman Act almost casually, in its last paragraph. We believe this point is adequately discussed in the Petition and will not discuss it further. Let us reiterate, however, that the fact that plaintiff did not join in the improper conduct demanded by defendant—but suffered the loss of its franchise instead—does not prevent defendant's conduct from being illegal.

We do not believe, as asserted by defendant in footnote 7, that a manufacturer has a right to cancel a dealer without cause, such franchise constituting valuable property of the dealer. In this position, the parties are diametrically opposed. True, in this case, Ford did not attempt to cancel the dealer for cause, so that this may be

academic; but, if we are correct upon our position, a cancellation cannot be compelled for improper reasons. This Court has never squarely determined this matter. It should be determined now.

6. Ford cannot impose a condition precedent to a statutory remedy.

The defendant has urged (page 13, bottom) that the plaintiff is precluded from bringing suit because it failed to complain to Ford's Policy Board. The defendant in its motion for summary judgment did not limit this defense to Count II. However, we can hardly believe that the defendant is seriously contending that it could create a defense based upon a contractual provision to preclude an action for a tortious violation of the antitrust laws. But even as to Count II, it is apparent that such clause would be inapplicable and invalid. The clause in question reads:

> "In the interest of maintaining harmonious relationships between the parties to this agreement, the dealer shall report promptly in writing to the Chairman of the Company's Dealer Policy Board, or to such other person as may be designated by the Executive Committee of the Company from time to time, any act or failure to act on the part of the Company or any of its representatives, which the dealer deems not to have been, or that the Dealer proposes to use in support of a claim that the Company has not acted in good faith as to the dealer."

One could question whether such is relevant where the dealer is in the process of being cancelled. One is hardly interested then in "maintaining harmonious relationships between the parties." And in a suit for damages under the Act, such failure to give notice is at most only a factor to be considered by a jury in determining the question of good faith, Blenke Brothers Co. v. Ford Motor Co.,

D. C. Ind., 217 F. Supp. 459 at 464. A summary judgment, it was held in that case, would not lie for failure to seek a remedy from the board.

Indeed, it would seem to be against public policy to allow the manufacturer to impose any condition upon the right of a dealer to statutory relief. If it could do so, then an employer could insist that an employee submit his injury claim to a panel of its executives before filing for workmen's compensation. The Policy Board, unlike the Dealer's Council, is comprised of salaried representatives of the defendant and is wholly within the defendant's control (App. 43). As pointed out by Mr. Fabert, recourse to the board was a fruitless thing in avoiding a threatened cancellation as he knew from personal experience (App. 43).

Moreover, it should be remembered that the purpose of the act was to create "a cause of action where none previously existed in that, irrespective of contractual provisions, it grants a right of review in the Federal courts of disputes between automobile manufacturers and their dealers involving the good faith of the manufacturer in complying with, in terminating, or in not renewing franchises." 3 *U. S. Code Cong. & Ad. News,* page 4596 (84th Cong. 2d Sess. 1956). The discussion commencing upon that page and ending upon page 4601 is most enlightening. To enforce a provision in a contract requiring a dealer to appeal to a handful of the manufacturer's employees is to impede the judicial remedy granted by Congress. Blenke Brothers Co. v. Ford Motor Co., *supra,* 217 F. Supp. 459 at 464.

CONCLUSION.

We must constantly bear in mind that there was no finding on the merits in favor of the defendant following a full and fair trial. Here, a summary judgment was entered in favor of the automobile manufacturer without

the plaintiff ever having had a day in court upon the merits. The abuses to which dealers of the Big Three have been subjected are well pointed out in the *Burns* book, the *Wilson* monograph, and the Addendum to the Petition. As this Court pointed out in the *White Motor Company* case, p. 263:

> "Thus, unless the tying device is employed by a small company in an attempt to break into a market * * * the use of a tying device can rarely be harmonized with the stricture of the antitrust laws, which are intended primarily to preserve and stimulate competition."

We have a situation here where Ford Motor Company originally denied that it had attempted to force its various franchise holders to take on the losing Edsel franchise as a condition of retaining the businesses which they had built up over a period of years, and which possessed great value to them. The services which they had rendered to customers for many years, the advertising which they had done in an effort to create good will, and the repeat business which resulted therefrom all went down the drain unless they would accede to the demand made upon them. This demand was made at a time when severe economic pressures had been placed upon the dealers by reason of general economic conditions, competition by another car within the same price class manufactured by their own company, and two years of bad engine models—plus the additional factor, in Fabert's case, of requiring him to open up an unnecessary branch in Rantoul which caused three years of duplicate expense. Ford then stated to Fabert: "Take the Edsel or resign; if you do not resign, we will cancel you—and you will never get another franchise, nor the full value for your parts and equipment."

Execution of a release under circumstances of such a forced resignation would seem to present the precise

situation which the Dealers Day in Court Act was designed to prevent. The "tie-in" demand also would seem to violate the antitrust laws. At least, it seems reasonable to believe that factual questions are presented for jury determination as to whether or not the manufacturer acted coercively in this case, whether adequate consideration was paid for the release of the franchise, whether the petitioner should have succumbed to the pressure, and any other questions reasonably presented. If trial judges are to resolve such issues summarily, then this Court's observation in Poller v. Columbia Broadcasting System, Inc., 368 U. S. 464 at 473, should be modified. However, we believe the language and spirit of that decision should be followed.

In view of the fact that the principles involved in this case concern thousands of automobile dealers and the construction of these important statutes, we earnestly pray that a writ of certiorari issue to review the judgment and orders of the Court of Appeals of the Seventh Circuit heretofore entered in this cause.

Respectfully submitted,

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Certificate of Service.

I hereby certify that a true copy of the foregoing Reply Brief of Petitioner has been served on W. Donald McSweeney and William A. Montgomery, Attorneys at Law, 231 South La Salle, Chicago, Illinois, this 25 day of April, 1966, by air mail.

Arthur L. Price, Jr.